***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S REPLY BRIEF

# 76-1340

*To be argued by*
PETER FLEMING JR.

B/S

## United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
*Appellee,*

v.

JAMES D. HANLON, COSTAS NASLAS, and PAUL KATRITSIS,
*Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

# REPLY BRIEF FOR DEFENDANTS HANLON, NASLAS, AND KATRITSIS



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# REPLY BRIEF OF APPELLANTS HANLON, NASLAS & KATRITSIS

## PRELIMINARY STATEMENT

The prosecution has submitted a brief of 121 pages, with massive additional footnote argument, to support its claim that these defendants were fairly convicted. In fact, it does the opposite. Like the trial itself, the brief, stripped of its verbosity and irrelevant detail, demonstrates the paper-thin quality of the proof on knowledge and argues inferences which, even in writing, remain the speculation they were at trial.

The short of the matter is that the prosecutor's brief makes our precise point: that the evidence of guilty knowledge was minimal at best, that treatment of the knowledge issue therefore required utmost care by court and prosecutor, that that care was not exercised, and that speculation and an unfair instruction on alleged recklessness deprived these defendants of a fair trial.

## REPLY POINT I

### REPLYING TO THE PROSECUTION'S ARGUMENTS ON THE SUFFICIENCY OF ITS EVIDENCE

Having set forth the "facts", the prosecution spends 20 pages (GB 46-69) arguing their sufficiency on the various individual counts. As with its summation during the trial, the prosecution's argument in this Court is permeated with speculation and factually unfounded inference. The prosecution's brief thereby proves our basic point: that this case evidences an attempt to bridge evidentiary gaps with surmise, or, in other words, with an argument that the defendants must have had criminal knowledge even though evidence thereof was lacking.

We cannot in this brief point out each instance of prosecutorial speculation. While a few examples follow, we refer this Court to our main brief and to the prosecution's brief as a whole.

A. Katritsis

There just was no evidence of guilty knowledge on Katritsis' part. It is not surprising then that the prosecution relies so heavily upon the

essentially irrelevant and heavily-impeached testimony of Joyce Walker that Katritsis may have retyped some falsified financial statements after the transactions on which he is charged (GB 65-68).

What is most shocking however is the prosecution's argument that Katritsis must have known that the Tropis/Tekton and Tachys charters were false because, some months earlier, Katritsis signed other charters which in fact were false. In a case so thin, this argument, as it was at trial, is simply outrageous.

Katritsis did sign certain charters which in fact were false. But the prosecution itself produced Delfos who typed those charters and who under immunity, testified to their preparation. And Delfos, a star prosecution witness, gave no evidence to even indicate that Katritsis, who was then 20, had the slightest idea that the charters were false. Nor did any other witness accuse Katritsis. Nor did any other document. Nor did the grand jury or the prosecution even allege any criminal knowledge on Katritsis' part in this connection.

There simply is no excuse for the argument which the prosecution now makes on this issue, as it did at the trial. There is no evidence to support the argument. The prosecution knows this. The argument

demonstrates nothing more than the absence of actual evidence of criminal knowledge on Katritsis' part at any time and the impermissible lengths to which the prosecution in this case was willing to go to obtain a conviction.

B. Naslas

The same sort of speculative argument pervades the assertion of sufficiency against Naslas.

For example, the charge on the Tekton/Tropis loan in December 1971 was that the charter was raised falsely from three to five years. Without dispute, this was done in London by Livas, Amanatides, and Blonsky. The prosecution argues that Naslas must have known this because he "was familiar" with the purchase of the ships from Karegeorgis a year earlier "at which time" the ships were on 3-year charter. But familiarity with the fact that the ships were purchased from Karegeorgis, whatever "familiarity" may mean, does not establish knowledge of the charter terms at that time, and, even if it did, certainly does not establish knowledge that the 5-year terms a year later were fabrications.

Of a kind is the prosecution's claim that Naslas knew the Tachys' charter was forged because, in the prosecution's words, it "would be amazing, to say

the least" that Naslas, who "specialized in ship operations", would not know that one of Tidal's 47 ships which in fact was never proved to be under his control, was operating without a charter (GB 63).

The prosecution also engages in overall bootstrapping when it argues that Naslas must have known of fraud on the Tropis/Tekton, Tachys, and Tagma because he participated in bribe payments to Shevlin and Metzger (GB 62, 64, 65). This argument, while perhaps more rational than the prosecutor's other inferences, is in fact rational only if Naslas did participate in bribery. Our point is that that question likewise was not free from doubt, as argued in our main brief, and that its determination was infected by the same erroneous instruction on recklessness as infected determination of the fraud counts.

C. Hanlon

The charge on the Trechon loan (Counts 18, 22) was that the ship's purchase price had been misrepresented to the Bank of America in London. The prosecution's own witness, Bustard, said that Livas and Amanatides, and not Hanlon, had said the purchase price was $5.5 million. The prosecution largely ignores this undisputed evidence and argues, for example (a) that Hanlon's knowledge that the loan exceeded the true purchase price "compelled the con-

clusion" that Hanlon knew the purchase price had been misrepresented (GB 53), (b) that it "is inconceivable" that Hanlon did not know the terms of the BOA line of credit even though Hanlon never even saw its draft until a month after the Trechon loan (GB 53-54), and (c) that it "is difficult to imagine" how Hanlon could have represented Tidal in New York and billed $2170 for his services without knowing of the price representation in London by Livas and Amanatides (GB 54). We submit these arguments are wholly speculative. The truth of the matter is that no evidence connected Hanlon with the Livas/Amanatides misrepresentation, or knowledge thereof, and that no amount of speculative rhetoric can fill that evidentiary void.

There likewise was no evidence that Hanlon knew of the Scufalos sham in connection with the six ship loan at NBNA in August 1971. Yet the prosecution argues, again as it did below, that Hanlon must have known, that Amanatides must have told Hanlon to avoid the risk of inadvertent disclosure,* and that Hanlon, since he allegedly knew of the Scufalos sham on the Tekton/Tropis loan five months later in December, must also have known of the sham in August (GB 59).

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* Although Amanatides himself took the risk of signing a personal guaranty in connection with the loan.

This last proposition again demonstrates our point that care was required on the knowledge issue. Scufalos did act as nominee on the Tekton/Tropis loans on DEcember 24, 1971, and Martin, the Bank's attorney, did testify that Hanlon said Scufalos was the real borrower. But Hanlon denied this, and in fact his denial was supported, and Martin impeached, by undisputed other evidence on that loan. Thus, when the only disagreement at that closing arose, Hanlon indisputedly discussed it with Amanatides, who was present while Scufalos was not, and both Martin and the bank officers saw Hanlon discuss this agreement with Amanatides. Our point is not that Martin's evidence was insufficient, but that it was the only direct evidence of knowledge, was impeached by undisputed evidence, was denied by Hanlon, was capable of argument, and required submission to the jury with adequate safeguards. And that need certainly is compounded when the prosecution relies on this state of the evidence to establish Hanlon's guilt, not only on the Tekton/Tropis transaction, but also on the six ship loan five months earlier in August 1971.

* * * * * * *

The prosecution's brief establishes one fact clearly. These defendants found themselves surrounded

by an intricate and complex web of circumstances. Precisely because of this fact, the crucial line between innocent presence and guilty participation had to be drawn as clearly and as specifically as possible. And the prosecution was obliged to refrain from the kind of speculative and conclusory assertions of guilt in which it repeatedly engaged in summation and now on this appeal.

If ever there were a case where utmost care was required on the issue of personal guilt, this is that case. It was not exercised.

## REPLY POINT II

## REPLYING TO THE PROSECUTION'S SUPPORT OF THE RECKLESSNESS INSTRUCTION

In its defense of Judge Pollack's charge on recklessness, the prosecution fails to come to grips with our basic point: that the instruction permitted the jury to convict upon a finding of recklessness. Instead, the prosecution defends the charge on the ground that the erroneous portions were "balanced" by correct language.

The prosecution argues that the charge should be read as a whole. We urge the Court to read the charge as a whole, for even when read together with boilerplate instructions on knowledge, the reckless charge was an inaccurate and misleading statement of the law. There is no way around the fact that Judge Pollack told the jury that (a) knowledge was an element, (b) that it did not have to be proved to a certainty, and (c) that evidence of recklessness was sufficient to convict. Judge Pollack moreover gave this instruction seriatim and, once into his recklessness portion, used the term "reckless" six times in six consecutive paragraphs, and concluded with words which told the jury it might find guilt if it found that "such misstatements either were

done knowingly and deliberately or . . . with reckless disregard or reckless indifference as to whether such representations were false" (A 1761-1762; GB 78 fn.).

To the extent that the prosecution defends the recklessness language itself it does so by claiming that Judge Pollack's charge was not as bad as the three recklessness charges most recently discussed by this Court. That claim is absurd. In United States v. Gentile, 530 F.2d 461, 469 (2d Cir. 1976), the judge charged that the jury could consider as evidence of knowing conduct whether the defendant "deliberately closed his eyes to what otherwise would have been obvious to him." (emphasis added). On appeal the defendant attacked the trial court's failure to specifically charge that the defendant's actual belief in the truth of his statement was a defense. The conviction was sustained both because the trial courts several times did charge on good faith as a defense and because "the trial court scrupulously avoided use of the technical and confusing phrase 'reckless disregard' . . ." (530 F.2d at 470). Judge Pollack however used the "technical and confusing phrase 'reckless disregard'" six times in as many paragraphs.

In United States v. Bright, 517 F.2d 584, 586 (2d Cir. 1975), this Court reversed a charge which was less egregiously prejudicial than that given here. The trial court there used "reckless disregard" language without

balancing language to the effect that actual good faith belief was a defense. This Court on appeal held a "reckless disregard" charge to be defective because that term was not sufficiently clarified for the jury to prevent a conviction based on negligence.

Finally, the prosecution cites the charge in United States v. Natelli, 527 F.2d 311 (2d Cir. 1975). Although the prosecution claims the charge in Natelli was less favorable to the defendants than that given here (GB 76, fn. *), the passage cited by the government belies that assertion. First, the recklessness paragraph is immediately preceded and followed by cautionary language ruling out negligence as a basis for conviction. Moreover Judge Tyler did not repeat the words "reckless" six times and, consistently modified its limited use with the word "deliberate." The Natelli charge permitted the jury to find "such intent if he deliberately closed his eyes to the obvious" or if he "recklessly stated as facts matters of which he knew he was ignorant." Finally, the charge stated that "such reckless deliberate indifference to or disregard of the truth" permits an inference that the defendants "wilfully and knowingly" made a false statement (527 F.2d at 322 n. 9) (emphasis added). Clearly, the Natelli charge communicated to the jury that its finding was to be based on actual knowledge. Just as clearly, Judge Pollack's charge below did not.

In our main brief we point out that the error of Judge Pollack's instruction was compounded by his recitation of certain improper inferences which he said could support a finding of knowledge. Although the prosecution in its brief correctly points out that knowledge may be inferred from circumstantial evidence, Bentel v. United States, 13 F.2d 327, 329 (2d Cir. 1926), and that the judge in his charge may recite evidence from which an inference of knowledge may be drawn, the prosecution completely misses our point. That point is that the evidence recited by Judge Pollack did not support an inference of knowledge. Even worse, that evidence may have supported an inference of recklessness, thereby increasing the likelihood that the jury was prejudicially misled by the erroneous charge. Hence the prosecution's listing of facts which the judge might have recited is irrelevant.

Finally, the prosecution argues that the defense requested the charge it got. This claim is untenable. The prosecution initiated a request for a recklessness charge, and it was clear that Judge Pollack was prepared to give one. That defendants submitted their own recklessness charge in self-defense is irrelevant. Moreover defendants' proposed charge (GB 71) was fair and balanced, should have been given, and was not. The prosecution's attempt to compare the

defendants' use of the Model Penal Code language ("aware of a high probability that the statements made were false") with Judge Pollack's crucial language ("it is not necessary that the government prove to a certainty that a defendant . . . knew any given fact or facts") (GB 71) is ludicrous.

Clearly, if Judge Pollack had wished to use the "high probability" language, undoubtedly he would have, first, because defense counsel requested it (A1929 ), and, second, because that was precisely the language which Judge Pollack did use in United States v. Brawer, 482 F. 2d 117, 128 (2d Cir. 1973), where this Court found his charge properly balanced.

Indeed, a simple way to demonstrate the imbalance and unfairness of the charge in this case is to compare it with the charge Judge Pollack gave in the Brawer case.

In the Brawer case, Judge Pollack used with approval the "high probability" language which the defense requested here. In the instant case, the "high probability" language was not used, even though, as we have noted, the defense request included it.

In the Brawer case, it appears that Judge Pollack did not use the words "reckless" or "recklessness." 482 F.2d at 128, n.14. In this case, Judge Pollack used the words "reckless" or "recklessness" six times in as many consecutive paragraphs, even though this Court's most recent decision,

Gentile, noted approvingly that there "the trial judge scrupulously avoided use of the technical and confusing phrase 'reckless disregard' . . ." United States v. Gentile, supra, 530 F. 2d at 470.

In the Brawer case, Judge Pollack did not juxtapose the words "actual knowledge" and "reckless disregard". Here, as we have noted, Judge Pollack finished off his instructions with the admonition that guilt was established if misstatements "either were done knowingly and deliberately or . . . with reckless disregard or reckless indifference as to whether such representations were false" (A 1761-1762; GB 78 en.).

If balance is the issue, as it must be, there was none here, however diligently the prosecution may search. All else aside, the use of "reckless disregard" six times in six paragraphs requires reversal of these criminal convictions.

## REPLY POINT III

## REPLYING TO THE PROSECUTION'S SUPPORT OF ITS SUMMATION

In its defense of a summation that repeatedly called for the jury speculation, the prosecution fails to offer any evidence to support the conclusions which it asked the jury to draw. Instead, the prosecution's brief simply restates the speculative arguments that the prosecutor made at trial. This response is not a response at all, it is simply an invitation to this Court to hold that juries should be permitted to speculate as to facts not proved and that prosecutors should be permitted to ask them to do so.

For example, the prosecution continues to argue, as it did at trial, that a conclusion of Hanlon's guilt on the ION loans is "virtually compelled by the fact that Hanlon spent close to 100 hours working on these loan transactions, attended the loan closings, formed a Liberian shell corporation in the same name as the selling corporation prior to the loan closing and committed other [unspecified and non-existent] fraudulent acts in connection with these loans" (GB 88). Both naive and untenable, this argument would convict any lawyer who did legal work for a man or men who later were found to be crooks. It would establish the guilt of any auditor once insider fraud was proved, without

more. It would in fact convict a prosecutor of the knowing use of perjured testimony upon a demonstration that an accomplice witness on the prosecutor's case had lied under oath. It is guilt by association in spades.

We believe it is important to respond to one other specific item. The prosecution urges that it also was proper to argue that Shevlin was telling the truth because prosecution assistance on sentence in fact was contingent upon his truthful testimony at trial" (GB95). But somewhere along the line the reality of prosecution must be recognized. Accomplice witnesses are not rewarded for exonerating targets of investigation. Assistance on sentence requires testimony which incriminates. Everyone involved in the process knows this, and the accomplice witness most of all. The prosecutor's argument was improper, its justification in this appeal is frivolous, and, further, it makes not even an attempt to defend against our point that the argument also drew the trial court into questions of credibility and was improper for this reason alone.

## REPLY POINT IV

### REPLYING TO THE PROSECUTION'S CONTENTIONS WITH RESPECT TO COLLATERAL ESTOPPEL

In our main brief, we contended that principles of collateral estoppel barred Shevlin's testimony at Naslas' trial. That claim was predicated upon the fact that Shevlin testified to what amounted to a single transaction in which Naslas allegedly paid both Metzger and Shevlin at the same time. Furthermore, the prosecution's claim at both Naslas' and Metzger's trial was that there was <u>one</u> agreement to bribe the bank officers which was paid in installments. We argued, therefore, that under the precise factual circumstances of this case, the acquittal of Metzger at his trial constituted a flat rejection of Shevlin's testimony. In responding to our collateral estoppel claim the prosecution makes various arguments, all of which, for the most part, miss the point completely.

The prosecution argues that collateral estoppel does not apply because it had other evidence in addition to Shevlin's testimony. However, we have never asserted or claimed that principles of collateral estoppel precluded evidence not adduced at Metzger's trial. We have never stated that the prosecution was precluded from offering

other proof in its possession establishing Naslas' participation in the so-called bribery. Therefore, the fact that the prosecution had other evidence is totally irrelevant to our collateral estoppel claim. We submit most respectfully however that in the absence of Shevlin's testimony the other evidence offered by the prosecution at that trial was insufficient to sustain the verdict against Naslas on counts 1, 3 and 4 of Information 75 Cr. 1176 and that he therefore was entitled to an acquittal.

The prosecution also argues that principles of collateral estoppel should not apply because the prosecution did not have the same motivation to establish Naslas' guilt in Metzger's trial that it had in Naslas' trial. This argument overlooks the essential fact that in both trials the prosecution had exactly the same motivation to persuade the jury that Shevlin was a credible witness, since in both trials Shevlin's testimony was essential to a verdict. The prosecution, having put its best foot forward in attempting to persuade a jury of Shevlin's credibility in Metzger's trial, was not entitled to a second day in court on that issue.

Finally, the prosecution argues that principles of collateral estoppel should not have the same applicability in criminal cases as they have in civil cases. For reasons which are set forth in our main brief, it is absolutely

inconsistent with sound judicial policy and with due process to afford a greater protection to civil litigants than is afforded to criminal defendants. See main brief at 45-48.

## REPLY POINT V

### REPLYING TO THE PROSECUTION'S ARGUMENTS WITH REGARD TO OTHER TRIAL ERROR

A. Shevlin's Cross-Examination (GB-115)

Shevlin was much more than a witness to bribery, as the prosecution's brief itself demonstrates.

Shevlin was the only government witness to put Naslas in a position of responsibility for Tidal's financial dealings, and the prosecution's brief relies heavily on his testimony for this point (GB 8, 23, and 60). In addition, Shevlin was the only witness to say that Naslas had knowledge of NBNA's loan limit on Tidal (A. 926-27), and the prosecution also relies on this evidence to sustain the sufficiency of the fraud counts against Naslas (GB 14).

Shevlin's prior 500 page NBNA transcript however was completely inconsistent with his trial testimony on these points and it was on these points that Shevlin was being impeached when the court wrongly intruded. Yet the prosecution urges that this improper judicial intrusion

was of no moment. Such an argument is absurd.

There can be no question that Judge Pollack prejudicially affected the strength of defense counsel's impeachment of Shevlin with his unwarranted interruption and subsequent comments. Even the prosecution's quotation of the subsequent colloquy is revealing. In it Judge Pollack accuses defense counsel of "rattling along with a lot of statements that you say are taken from sources for which there is no foundation . . . It's not evidence, and the fact that you read it doesn't make it evidence. That's a statement that you say was made on a prior occasion for which there is no foundation in the record at this time" (GB 112, fn.*** ).

We just have no idea what Judge Pollack meant in the context of this case.

(a) The "source" of the cross-examination was a 500 page Q & A statement of Shevlin's, which the prosecution had produced under 18 U.S.C. 3500, which Shevlin admitted having made (A. 992-94) and to which there was just no dispute as to authenticity. Just why that "source" had "no foundation", as Judge Pollack said in the jury's presence, simply escapes us.

(b) The repeated judicial assertion that the Q & A was not "evidence" likewise was without meaning. The Q & A was impeachment material. Shevlin was simply asked if, on a prior occasion under oath, he had given answers inconsistent with his trial testimony. Whether his admitted inconsistencies were "evidence" or not was and is immaterial.

Indeed, the very Q & A which precipitated the interruption also was an inconsistency. In it, Shevlin said to NBNA that "Naslas did not get along with Livas at all. I think that was his principal reason for leaving . . ." and that Naslas was "an excellent operating man and he was going out on his own [on April 28, 1972]" (GB 111).

These prior declarations flatly contradicted Shevlin's reconstituted testimony that Naslas was often with Livas at important meetings, and indeed that Naslas, in April and May 1972, participated with Amanatides and Livas in trying to save Tidal's situation at NBNA, accusations which Shevlin had never made before.

Judge Pollack's interruption was exactly what the prosecution now calls it, namely, "a direction to defense counsel to 'stop testifying'" (GB 112). But it was and is very clear that defense counsel was not "testifying;" he was cross-examining in the ordinary time-

honored procedure of confronting a witness with material prior inconsistent sworn statements as to which authenticity was not disputed.

When Judge Pollack, as the prosecution notes, in effect told counsel to stop "testifying", the jury necessarily received the impression that the line of proper and meaningful cross-examination of this key witness was in fact neither proper nor meaningful.

We cannot perceive how any judicial interruption could be more harmful or less warranted. Its damage is simply mangified by the prosecution's broad and repeated arguments that Shevlin's trial embellishments as to Naslas' overall functions at Tidal in fact established his guilty knowledge of fraud.

B. Flemming's Cross-Examination

Flemming testified that Hanlon told him the Aquario charter was 42 months. If true, this was false on Hanlon's part. In his civil deposition, in connection with the Aquario charter, Flemming was asked the following questions and gave the following answers (A 457-458):

> "Q. In connection with the work that you performed on this transaction [Aquario] did you or anyone acting on your behalf undertake an investigation of the . . . three-year time charter with Shell Oil Company?"

"A. We obtained certain documentation respecting that charter, yes".

"Q. What was that documentation?

"A. A copy of such a purported charter, a certificate from Livas representing that charter to be a true and correct charter."

In his civil deposition, as opposed to his trial testimony, Flemming -- asked what "investigation" he had undertaken -- said nothing of Hanlon's purported verification of the false 42 month term.

It is nonsense for the prosecution to argue there was no inconsistency, and it was wrong for Judge Pollack to so infer in the jury's presence. As the prosecution correctly quotes Judge Pollack's own view of the matter at the time (GB 118, fn.* * *):

"I don't know what point you are trying to make to me. I am saying to you that you read a question from the deposition which asked for the documentation, and that's all I said, and that's all the jury understood me to say." [Emphasis added].

Our point is that the question was not one which, in Judge Pollack's words, "asked for the documentation." The question asked for the "investigation" which Flemming had undertaken. The fact that Flemming's answer was in terms of documentation only, and omitted Hanlon's alleged

oral verification, was the inconsistency and the point we were trying to make. The trial judge's intervention confused and missed the point, as is evidenced by his statements during later colloquy on our mistrial application (A. 491-494).

The point was not minor. Flemming's trial accusation was the only direct evidence that Hanlon knew the Aquario charter had been raised falsely.

C. Naslas Resignation Letter

There is no merit to the argument that Naslas' letter should have been excluded because it was a so-called "self-serving prior consistent statement" (GB 119). The letter was written well before any investigation of Tidal and before Naslas had any motive to misrepresent. The letter was probative on Naslas' state of mind.

The prosecution further claims that the letter was cumulative because Shevlin had said that Naslas did not like Livas (GB 120). This argument is especially amusing, since the Shevlin "testimony" to which the prosecution refers is not Shevlin's direct testimony, but rather is the impeaching Q & A which, on another point, the prosecution argues was of no moment when the court interrupted that very impeachment of Shevlin, supra, POINT V, (A. 1033). Here then is yet another example of the prosecution arguing this complex record in any manner which suits its immediate purpose.

## REPLY POINT VI

## REPLYING TO THE PROSECUTION'S ARGUMENT THAT IT DID NOT MAKE ARGUMENTS WHICH IT KNEW TO BE FALSE

A. Ionic King and Queen Charters

The prosecution does not really contest the fact that it argued facts it knew to be false. Instead it tries to blame the defense.

As noted in our main brief, during the weekend between Hanlon's testimony and summations, defense counsel called both the witness Mr. MacKenzie and counsel to BP Tankers in England. Both confirmed the extension of the charters from 3 to 5 years. Counsel for BP also said the prosecution had been told this before, and agreed to be available for a telephone call from Mr. Glekel to reconfirm it. Defense counsel asked Mr. Glekel to call and reconfirm the fact. Our best recollection is that Mr. Glekel told us before summation that he had called BP's counsel, who had reconfirmed the extensions, but that the prosecution refused to sign a stipulation to that effect (A. 1893-1896) because, to our recollection, and as the prosecution suggests in its brief (GB 101), there might have existed some "irregular conduct" in connection with the extension. In short, the prosecution, to our recollection, did not dispute the extensions of the charters

from 3 to 5 years, but refused to stipulate to this fact for other reasons.

Although stipulation to undisputed facts had been the practice during the trial, we do not contest the prosecution's unwillingness to stipulate in this instance. Our point is that the prosecution should not thereafter have argued that Hanlon was fabricating when he testified to his recollection of the extensions on these two ships. The truth was that the charters had in fact been extended. The prosecutor knew that was the truth, and, according to BP's general counsel, had known so for some time prior to the trial. Indeed, on this last fact, it would seem to have been improper for the prosecution to have elicited from MacKenzie the testimony that BP was not entering into 5 year charters at the time in question, if the prosecution had in fact been told of the extension to 5 years of the Ionic King and Ionic Queen charters (A.375).

The prosecution's attempt to blame the defense for the prosecution's own falsification is simply without merit.

B. Naslas' Prior Statement

Naslas' testimony on the bribery issue was identical to a statement he gave the prosecution on the same events nine months before he ever heard the prosecution's evidence. The prosecution knew this and does not

now deny it. On this state of undisputed fact it was flatly improper for the prosecution to argue to the jury that Naslas' testimony "is a clear fabrication invented and developed for no other reason than to meet the proof against him which he had full opportunity to listen to prior to his testimony."

The prosecution again does not seriously contest its falsification. Instead it argues that the falsification was "cured" by Judge Pollack.

First, we cannot conceive that prosecutorial misconduct, especially at the level of knowingly misstating facts, can be "cured" by judicial action. The only appropriate remedy in such circumstances is a mistrial.

Second, the "cure" really did not cure. It consisted principally of reading, with date, Naslas' pre-trial statement, without any explanation of its relevance to the impropriety which had occurred, and reading also, with date, a prosecutor's notes of his "cooperation" agreement with Shevlin (A. 1734-1736).

The prosecution's argument that the defense accepted the so-called "cure" is highly misleading. The defense moved for a mistrial (A. 1717). When Judge Pollack offered to read Naslas' pre-trial statement to the jury as curing "anything that you may have charged or overcharged . . . ", defense counsel specifically said, "I can't say that it cures it" (A. 1727). Judge Pollack then said he

would not allow the defense to "play fast and loose with me" (A. 1727). The essence of the colloquy was that Judge Pollack would make no attempt to correct the effect of the misconduct unless the defense waived its motion for a mistrial. No waiver can be found in such coercing circumstances. United States v. Squires, 440 F.2d 850, 862 (2d Cir. 1971). For a full understanding of why we claim there was no valid waiver we most respectfully refer this Court to the entire colloquy (A. 1717-1734).

There likewise is no merit to the claim that the defense obtained a tactical advantage as a result of the supposed cure (GB 103-104, fn. ***). The facts are clear. Naslas was interviewed by the prosecution, including Mr. Glekel, on October 3, 1975. Naslas described the Christmas photographs incident at that time. On October 7, 1975, four days later, the prosecution made its deal with Shevlin (A. 1736). The defense in fact did attempt to prove these facts throughout the trial (See e.g., A. 1049-52). Its purpose was to establish the inference that Shevlin had never accused Naslas until after Naslas accused Shevlin. The inference was proper. The evidence supporting it, which was undisputed, should have been allowed. It was not.

The prosecution's present argument that the defense was playing fast and loose since it purportedly "declined" to call Mr. Gordan as a witness (GB 104-105, fn. ***) is

inaccurate to the prosecution's knowledge. The facts are that the prosecution said it was going to call Mr. Gordan to introduce Naslas' October 3 statement, that the prosecution decided not to call Mr. Gordan, and that the defense then telephone Mr. Gordan only to find that he was away on vacation and unavailable (A. 1733-34). Perhaps it will be argued that the defense should have subpoenaed Mr. Gordan before trial, despite the prosecution's expressed intention to call Mr. Gordan itself. We did not do so and therefore have raised no claim on his unavailability. But these facts are a far cry from the prosecution's present assertion that the defense "declined" to call Mr. Gordan and therefore was simply trying to seek tactical advantages.

## CONCLUSION

Fraud and false statement counts 10, 18, 22, 36, 62 and 63 as to all defendants, and 51, 56, 57, 58, 59, 65, 66, and 76 as to Katritsis and Naslas, and all of the bribery counts should be dismissed. A new trial should be ordered on fraud and false statement counts 51, 56, 57, 67, 68, 75 and 76 as to Hanlon. Appropriate directions on recklessness instructions should issue.

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Respectfully submitted,

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